

DEPARTMENT OF STATE REVENUE
LETTER OF FINDINGS NUMBER 98-0649 ST
SALES AND USE TAX

For Tax Periods: 1995 Through 1997

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ISSUES

1. Sales and Use Tax-Food for Human Consumption Exemption

Authority: IC 6-2.5-2-1, IC 6-2.5-1-2, IC 6-2.5-5-20, 45 IAC 2.2-4-2.

Taxpayer protests the assessment of sales tax on food items.

2. Tax Administration-Negligence Penalty

Authority: IC 6-8.1-10-2(a)

Taxpayer protests the assessment of the negligence penalty.

STATEMENT OF FACTS

Taxpayer is in the business of selling specialty food products. These products include sausages, cheeses, meats, candy, cookies, desserts and gourmet coffees and teas. Other products sold include baskets, kitchen accessories and hostess gifts. Many of Taxpayer's products are packaged in gift boxes, gift baskets or commemorative tins. Taxpayer has one permanent retail store in Indiana, kiosks throughout the state during the Christmas holiday season and catalogue sales. In a routine audit, the Auditor assessed sales tax on all of Taxpayer's sales. Taxpayer protested the assessment and a hearing was held. More facts will be provided as necessary.

1. Sales and Use Tax-Food for Human Consumption Exemption

Discussion

Under IC 6-2.5-2-1, “an excise tax, known as the state gross retail tax [sales tax], is imposed on retail transactions made in Indiana.” According to IC 6-2.5-1-2, a “retail transaction” means a transaction of a retail merchant that constitutes selling at retail. Since Taxpayer is a retail merchant, generally its sales would be subject to the sales tax unless there was a specific exemption for any of Taxpayer’s sales in the law.

IC 6-2.5-5-20 (a) provides an exemption from sales that for sales of food for human consumption. IC 6-2.5-5-20(b) defines the specific phrase “food for human consumption” as including:

1. Cereals and cereal products.
2. Milk and milk products, including ice cream;
3. Meat and meat products;
4. Fish and fish products.
5. Eggs and egg products’
6. Vegetables and vegetable products;
7. Fruit and fruit products, including fruit juices;
8. Sugar, sugar substitutes, and sugar products;
9. Coffee and coffee substitutes;
10. Tea, cocoa, and cocoa products.
11. Spices, condiments, extracts, and salt;
12. Oleomargarine; and
13. Natural Spring Water.

In contrast, IC 6-2.5-5-20(c) excludes the following items from the definition of “food for human consumption”.

1. Candy, confectionery, and chewing guym;
2. Alcoholic beverages;
3. Cocktail mixes;
4. Soft drinks, sodas, and other similar beverages;
5. Medicines, tonics, vitamins, and other dietary supplements;
6. Water (except natural spring water, mineral water, carbonated water, and ice;
7. Pet food;
8. Food furnished, prepared, or served for consumption at a location, or on equipment, provided by the retail merchant.
9. Meals served by a retail merchant of the merchant’s premises;
10. Food sold by a retail merchant who ordinarily bags, wraps, or packages the food for immediate consumption on or near the merchant’s premises including food sold on a “take out” or “to go” basis; and
11. Food sold through a vending machine or by a street vendor.

Taxpayer agrees that the items which it sells that are candy are clearly taxable pursuant to the IC 6-2.5-5-20(c) exclusion of candy and confectionery from the food for human consumption exemption from the sales tax. Taxpayer withdrew its protest to the

additional sales tax assessed on candy and confectionery items as listed in documentation presented subsequent to the hearing.

Most of Taxpayer's food products are packaged in non-food containers which have an intrinsic value separate from that of the food. These retentive items can be used after the food is consumed. Examples include wicker baskets, decorative tins and toy trucks. Taxpayer has withdrawn its protest to the assessment of sales tax on items wherein a retentive item worth 25% or more of the total price of the item is sold with the food items.

Taxpayer's sales of taxable gift items bundled with a non-taxable sale of food is analogous to a unitary transaction of a taxable sale of tangible personal property combined with a non-taxable service. 45 IAC 2.2-4-2 designates unitary transactions taxable unless "the price charged for tangible property is inconsequential (not to exceed 10%) compared with the service charge." Similarly in any of Taxpayer's sales where the retentive items are worth more than 10% of the total price of the item, the transaction is subject to sales tax.

Finding

Taxpayer's protest to assessment of tax on transactions where the retentive items are worth 10% or more of the total price of the item is denied.

2. Tax Administration-Negligence Penalty

Taxpayer also protests the imposition of the negligence penalty pursuant to IC 6-8.1-10-2 (a), which states as follows:

If a person fails to . . . pay the full amount of tax shown on his return on or before the due date for the return or payment, incurs, upon examination by the department, a deficiency which is due to negligence, . . . the person is subject to a penalty.

In this case, evidence indicates that Taxpayer failed to set up a system for use by its various distributors to standardize the reporting of taxable sales and remission of tax. Some of Taxpayer's kiosks reported almost no taxable sales and others reported all sales as taxable. Taxpayer's breach of its duty to report and remit accurate sales tax collections to Indiana constitutes negligence.

Finding

Taxpayer's protest to the assessment of the negligence penalty is denied.